Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DARRICK BRADFORD,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

ISSUE I

WHETHER 21 U.S.C. 881 (b)(4) (RELATING TO FORFEITURES) IS AN EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT AND/OR WHETHER THE WARRANTLESS SEIZURE AND SEARCH OF AN AUTOMOBILE CONDUCTED WITHOUT EXIGENT CIRCUMSTANCES AND WITHOUT PROBABLE CAUSE WAS A VIOLATION OF THE FOURTH AMENDMENT?

ISSUE II

WHETHER THE CONDUCT OF THE GOVERNMENT REQUIRES ACQUITTAL OR NEW TRIAL WHEN (A) THE GOVERNMENT, AFTER DEFENDANT WAS ARRESTED AND CONTRARY TO SPECIFIC INSTRUCTIONS FROM DEFENDANT'S ATTORNEY, SECRETLY MET WITH DEFENDANT FOR SEVERAL MONTHS PRIOR TO TRIAL WITHOUT DEFENDANT'S ATTORNEY'S KNOWLEDGE OR PERSMISSION AND/OR (B) WHETHER DOUBLE JEOPARDY OCCURRED WHEN THE GOVERNMENT OBTAINED A SUPERCEDING INDICTMENT AFTER A JURY HAD BEEN SELECTED (BUT NOT SWORN FOR TRIAL) WITH A TRIAL SET TO OCCUR WITHIN DAYS AND THE GOVERNMENT REQUESTED AND RECEIVED A CONTINUANCE OF THE TRIAL AND THE JURY WAS DISCHARGED BASED ON THE SUPERCEDING INDICTMENT?

THE PARTIES

The caption in this case contains the name of all parties.

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REFERENCE TO OPINIONS DELIVERED BELOW

The U.S. District Court, Middle District of Alabama, by unpublished opinion, denied judgment of acquittal/new trial on October 8, 1992 (Appendix A). The U.S. Court of Appeals, Eleventh Circuit, Affirmed the conviction without opinion March 16, 1994 (Appendix B) and denied rehearing/rehearing en banc June 2, 1994 (Appendix C).

JURISDICTION

Judgment of conviction entered December 1, 1992. R2-88-1. Notice of appeal was filed December 2, 1992. On March 16, 1994, the U.S. Court of Appeals affirmed and on June 2, 1994, denied the Suggestion for Rehearing\Rehearing En Banc. This Petition is filed within 90 days of said denial. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment, U.S. Constitution, (Appendix D), Fifth Amendment, U.S. Constitution (Appendix E), Sixth Amendment, U.S. Constitution (Appendix F), 21 U.S.C. 881 (b)(4), (APPENDIX G).

STATEMENT OF THE CASE

On April 21, 1992, while executing search warrants and indictments (unrelated to Petitioner) FBI Agent Robert E. Lee and Alabama Alcohol Beverage Control (ABC) Agent Leslie Moore observed a brown two tone 1986 Blazer located at McQueen Auto Body Shop on Mobile Highway in Montgomery, Alabama. (EX1-3,).[1] The vehicle had a dealer tag on it registered to Sporty Motor Company. Agent Lee testified that he had received informant

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[1] This testimony was an exhibit from R3-2 and will be referred to as EX1-page number.

information several months previously (he could not recall exactly when) that Sporty Motor Company was a front operation for drug trafficking and the Blazer had been purchased with drug proceeds. (EX1-3,4,10). The informant was not known to the agents on the scene, but was "reliable" according to information received from another officer. (R-9,11,13,14,15,18). They examined the vehicle and noticed on the inside front passenger seat an envelope with the name Darrick Bradford (Petitioner) with a Montgomery address. They approached Mr. McQueen at the business and was informed by him that the vehicle belonged to Petitioner. (EX1-4). Petitioner was confronted and denied ownership. (EX1-5). The agents went back to the vehicle, ran the VIN number and the tag. The tag was a dealer tag that was assigned to Sporty Motors. (EX1-5). At some point

Petitioner approached the agents and wanted to know if he could get some things out of the vehicle. He was not allowed to do that. He was told it was being seized by Agent Moore. Petitioner then left and was later observed running down the street. The agents seized the vehicle, searched it and inventoried the contents. At no time was there cause to place Petitioner under arrest. (EX1-6). Moore did not see Petitioner with any cocaine. (R7-32) At no time was Petitioner under arrest or told he was under arrest, nor did they have an arrest warrant for him. He was not one of the persons listed in the indictments being served. (R7-33). Petitioner was not told that he could not leave. He had not been charged with any crime. (R7-33). They had no probable cause to arrest him. (R7-34). Moore stated that they had no information about any drugs being in the Blazer. (R7-34). After

the drugs were found a complaint to arrest Bradford was issued. (R7-34).

Agent Lee testified that at the time they arrived at McQueen's Auto Repair on April 21, 1992, they did not have any type of paper work either civil or criminal authorizing them to seize the Blazer. (EX1-7,8). The agent admitted that they didn't have any information then that they didn't have fourteen (14) days prior to that date. They did not have a search warrant. They had not seen anyone driving the Blazer. Agent Moore admitted they had no seizure papers for Sporty Motor Company. (R7-10,11) (EX1-8,9).

Agent Lee said to the best of his knowledge Darrick Petitioner owned Sporty Motors but he was not certain of that, although he had worked this investigation for a year. (EX1-9).

Agent Lee testified that Frank Brown was

a Montgomery Police Officer who was fired the week prior to this hearing because of the cocaine found in the Blazer. The Blazer was registered to Brown. (EX1-10). They did not know that the Blazer was registered to Frank Brown until April 21, 1992, when they ran the VIN number. (R3-22). Agent Lee testified that Agent Moore recognized the tag initially just by looking at it and said it belonged to Sporty Motors. (EX1-11).

Agent Lee testified that former Montgomery Police Officer Frank Brown was not charged with possession of the cocaine. (R13). Agent Lee testified that he did not have any information from a confidential informant on April 21, that lead him to McQueen's Auto Repair. The only information that he had that day was:

> "well we saw the car there, we were able to run the motor, saw the tag on the car and saw

> that Bradford's name and address was on an envelope inside the vehicle on the front passenger seat." (EX1-14).

The agents had not received any report that there were drugs in the vehicle. (EX1-14) Agent Lee admitted his sole basis for the seizure was that he had heard several months earlier that it was purchased with drug proceeds. (EX1-14).

The agent admitted that they had a list of vehicles they were looking for that day to seize and the Blazer was not on that list. (EX1-16).

Agent Lee admitted that they saw no contraband in the vehicle. He had no information or any reason to suspect there was contraband in the vehicle. (EX1-18). They had no reason or authority to arrest Bradford. (EX1-18). Bradford was not the subject of the indictments, searches, arrests or seizures

that were going on that day. (EX1-18).

DEA agent Marshal Simons was called to the McQueen Auto location April 21, 1992. He had been involved in an investigation in which Petitioner was a target for about three (3) years. He stated that they had information that a brown and tan Blazer had been purchased by Petitioiner and titled in the name of Frank Brown. (EX1-22).

Marshal Simons determined as a result of interviews of employees of McQueen Auto that Petitioner had driven the Blazer in question to McQueen Auto that day. (EX1-24).

The agents seized the vehicle. They later did an inventory search. They could not find the keys so the vehicle had to be forcibly opened by use of a particular tool and a wrecker was called. During the inventory search they discovered a large brown bag. They discovered a light substance inside

the bag and conducted a field test for cocaine which was positive. (EX1-24,26). Prior to the seizure the brown bag within which the cocaine was later found was not visible from the windows. (R7-64,65). No contraband was obvious from standing outside the vehicle. There was nothing suspicious about the manilla envelope with the name and address on it. (EX1-28).

Agent Simons had a list (not judicially approved) of cars that date. (EX1-28). They did not have an indictment for Mr. Bradford that day, the Blazer was not on the list, but he thought the dealer plate was. (EX1-29).

The dealer plate did not have Sporty Motors on it but was registered to Sporty Motors. (EX1-29). Once they saw the vehicle with the license plate displayed on it they put two and two together. (R3-11). They had no tip from any confidential informant that

there were drugs in the vehicle. The fact that drugs were found: "was sheer happenstance." (EX1-32) About five hundred (500) grams of cocaine was found in the vehicle. (R3-14).

The new information that agent Simons had on April 21, 1992, was a manilla envelope that he saw on the seat of the car. In itself it was not suspicious. (R3-18). He recognized Petitioner's name on it and the return address of Maggie Thompson who he had investigated before. (R3-19). What was suspicious to him was: "That served to add probable cause in my mind at that point that Mr. Bradford was operating that vehicle on that date." R3-19.

Agents Simons had no reason to believe that there was any contraband in the vehicle. He had already made his decision once he got on the scene to seize the vehicle. (R3-20). He was called to the scene by Agent Moore.

(R3-21). Simons said it was not the plan that day to seize any items that the tag was attached to but a decision had to be made as far as on that date and time if enough probable cause existed to seize and forfeit the vehicle in question. (R7-54). Simons spoke with Agent Moore and determined to seize the vehicle. (R7-54).

None of the persons they were looking for regarding the service of the unrelated indictments and warrants were on the premises of McQueen's Auto. (R3-22).

They had no description of the Blazer. (R3-22). All they had was a dealers license plate and that a brown Blazer had been purchased by Petitioner. (R3-23). There was nothing on the dealer license plate about the color because there is no way of knowing what the dealer's license plate may be displayed on. (R3-23). That was all the information

Agent Simons had, he didn't know who the vehicle was purchased from, he didn't know how much the vehicle cost, he didn't know how much money in drug proceeds were used to purchase it. (R3-23).

The Court denied the motion to suppress. (R6-12).

On May 14, 1992, a one count indictment was filed charging Petitioner with possession with intent to distribute approximately 487 grams of cocaine. (R1-1-1).

On July 13, 1992, a jury was selected for the trial date of July 16, 1992, but not yet sworn for the trial. (R11-56). On July 14, 1992, a three count superseding indictment was filed charging Petitioner with conspiracy to distribute and possess with intent to distribute cocaine; distribution of cocaine; and Possession with intent to Distribute approximately 487 grams of cocaine. (R1-31-1).

On July 15, 1992, the Government filed a Motion to Continue the Trial. (R1-33-1). On July 16, 1992, the Motion to Continue was granted. (R1-35-1). The Clerk's office discharged the jury when the continuance was granted. (R12-32).

On September 14, 1992, a jury was selected and trial began. On September 17, 1992, a verdict of guilty was returned as to Counts I and III and not guilty as to Count II. (R2-65-1).

Petitioner moved for judgment of acquittal/new trial on the grounds that government misconduct occurred because government lawyers and agents talked to defendant without defense counsel present. (R11-10). Petitioner also claimed that the dismissal of the first jury that was selected was a calculated act on the part of Government to deny him a trial before a jury that had

been selected which included nine (9) black jurors thereby placing him in double jeopardy. (R11-2,10). Petitioner is black. The court stated that issue as follows:

> "If a defendant in a case picked a jury on Monday, and the jury was one that the defendant liked very much, and the Government decided, well, we don't want to try this defendant before that jury, lets bring in a superseding indictment and get that first jury dismissed and we will bring him in and try him before a second jury. Do you think that would be something that the court should tolerate?" (R11-8).

Marshal Simons was present when Petitioner turned himself in around April 22nd or 23rd of 1992, at the FBI office. (R11-13).

Agent Simons also recalled Petitioner's attorney[2], Troy Massey, directed them not to

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[2] Undersigned replaced Massey after sentencing.

have any conversations with Petitioner without the attorney being present. (R11-14). They understood that defense counsel was representing Petitioner on the charge. (R11-14). Petitioner was taken into custody at that time. (R11-14).

Agent Simons testified that they then met with Petitioner contrary to the attorney's instruction for a period of three (3) hours that very night, that the client indicated a willingness to talk to them without the attorney present. (R11-15). Mr. Simons stated that Petitioner was concerned about his cooperation with the Government being compromised by his attorney because his attorney represented another target. (R11-15). The people present at that meeting were Petitioner, Marshal Simons, DEA Agent Jack Wall, and Assistant United States Attorneys Charysse Alexander, Lewis Franklin and Broward

Segrest. (R11-15). At that meeting Petitioner signed a handwritten proffer agreement. (R11-15). Marshal Simons admitted that he made it known to all present the attorney's wish that Petitioner not be questioned without the attorney being present. (R11-16).

The agents had meetings with Petitioner subsequent to the three (3) hour meeting Agent Simons and the others had with him in April. During the month of May he said Petitioner contacted him telephonicly in excess of 20 times and came not only to the United States Attorneys Office but also to his office on several occasions. (R11-26,27). The agents or anyone else did not have the attorney's permission to talk with Petitioner during those meetings. (R11-28).

The initial talk between Petitioner and the agents took place because:

> " Mr. Bradford ask what the time that he was looking at, if probation was a possibility, and I explained to him that if he had any desire to cooperate with the Government, we could reach a written agreement." (R11-32).

The attorney was not present. The meetings and contacts continued until the early part of June, 1992. (R11-39).

Agent Simons said that Petitioner did make incriminating statements but none were used against him at trial. (R11-44).

Agent Simons said he had met with other defendants without their attorneys present on eight (8) or ten (10) different occasions. (R11-56).

The agents didn't tell the defense attorney until July 30th about the meetings with Petitioner. (R11-48). On every occasion that the agents met with Petitioner they knew that Troy Massey was still his lawyer of

record. (R11-49).

Agent Simons had about a weeks notice that he was going to be testifying before the Grand Jury on July 14, 1992. (R11-17). He was aware the case was scheduled for trial July 16, 1992. (R11-22). The Government had debriefed all the witnesses who testified in the trial prior to July 13, 1992. (R11-18). He said there were previous discussions as to a superseding indictment with his understanding that if they came up with enough information to obtain a superseding indictment that they would not be going to trial on July 16, 1992. (R11-23).

Assistant U.S. Attorney Franklin selected the July 13, 1992, jury; AUSA Alexander was not present. (R11-52).

Franklin had conversations with Alexander about the case, a decision was made over the week-end prior to the selection of the jury on

the original indictment to seek a superseding indictment. Alexander made the decision. Alexander drafted the indictment. (R11-53).

After the jury was picked Franklin did not tell anyone about the composition of the jury. He was satisfied with the composition. (R11-53).

Franklin said there were nine (9) blacks, three (3) whites and one (1) white alternate on the jury. He did strike some blacks but he did not remember how many. (R11-54).

Mr. Franklin did not recall that five (5) of the six (6) people he struck were black on July 13, 1992. (R11-61).

Mr. Franklin stated they were ready for trial for July 16th on this case. (R11-70). They had no missing witnesses or evidentiary problems.

Ms. Alexander said she had no knowledge of what the racial make-up of the jury was

until Mr. Massey told her. It had nothing to do with seeking a superseding indictment. (R12-9).

Ms. Alexander filed a motion requesting a continuance on July 15, 1992. (R11-55)(R12-7). The court granted the motion on July 15, 1992. (R12-10). The United States was prepared to go to trial on the 16th should the court not grant the continuance. (R12-10).

Franklin did not know Alexander was working on a superseding indictment. (R12-16). Alexander did not make any effort to notify Judge Albritton who was presiding over jury selection for July 13, 1992, that the Government was seeking a superseding indictment. (R12-17).

Ms. Alexander said she had no discussion with anyone about the racial composition of the jury until after Massey had informed her of the composition. (R12-20).

There was a stipulation that stated as follows: "Neither the United States nor the defense was prepared to go to trial on the superseding indictment on July 16th?" (R12-25).

The Court overruled the Motion for Judgment of Acquittal/New Trial. (R13-2). On November 19, 1992, Mr. Bradford was sentenced to a term of 360 months.(R2-87-1).

ARGUMENT

ISSUE I

WHETHER 21 U.S.C. 881 (b)(4) (RELATING TO FORFEITURES) IS AN EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT AND/OR WHETHER THE WARRANTLESS SEIZURE AND SEARCH OF AN AUTOMOBILE CONDUCTED WITHOUT EXIGENT CIRCUMSTANCES AND WITHOUT PROBABLE CAUSE WAS A VIOLATION OF THE FOURTH AMENDMENT?

The Government claimed authority to seize the vehicle in question without a warrant pursuant to the forfeiture law, 21 U.S.C. 881 (b) (4). In the instant case there was no finding of facts by the trial judge, the

District Court merely denied the motion to suppress. (R6-12).

There is a split among the circuits concerning the statutory construction of 21 U.S.C. 881 (b) (4). The following circuits, including the Eleventh Circuit, have upheld warrantless seizures pursuant to the statute even in the absence of traditional exceptions to the warrant requirement: United States v. Pace, 898 F.2d 1218, 1242 (7th Cir. 1990); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989); Unites States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983); and United States v. Bush, 647 F.2d 357, 368 (3rd Cir. 1981). Other circuits have required at least exigent circumstances in order to reconcile these statutory seizures pursuant to the Fourth Amendment: United States v. Mundy, 806 F.Supp. 373 (EDNY 1992)(interpreting United States v. LaSanta, 978

F.2d 1300 (2nd Cir 1992)); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989); and In re: Warrant to seize One 1988 Chevrolet, 677 F.S. 57 (D.Mass. 1988)(noting the continued vitality of United States v. Pappas, 613 F.2d 324 (1st Cir. 1979)(en banc)).

Petitioner urges this Court to grant certiorari in this case pursuant to Rule 10.1 (a), Rules of the Supreme Court, and in light of recent decisions by this Court in the area of forfeiture law statutory interpretation. In United States v. James Daniel Good Real Property, 62 L.W. 4013 (1993), this Court held that the due process clause required notice/hearing prior to a seizure of real property. In United States v. Parcel of Land Known As 92 Buena Vista Avenue, 61 L.W. 4189 (1992) it was held that 21 U.S.C. 881 (h) does not automatically vest title in the Government-it relates back if forfeited. In

Austin v. United States, ___U.S. ___, 113 S.Ct. 2801, 125 L.Ed 2d 488 (1993) and Alexander v. United States, 125 L.Ed 2d 441, (1993), it was held that the Eighth Amendment applies to forfeiture, overruling several other circuits including the Eleventh Circuit. Petitioner contends that Title 21 U.S.C. 881 (b)(4) is not an exception to the Fourth Amendment.

In applying the law to the facts of this case defendant urges this Court to recall Coolidge v. New Hampshire, 403 U.S.443, 91 S.Ct. 2022, 29 L.Ed 2d 564, 579-581, in which it was stated that the mobility of a vehicle as a characteristic distinguishing it from other objects becomes less significant when the car is unoccupied and not being used for any illegal purpose at the time of seizure. That very factual situation is present here. The case of Calero-Toledo v. Pierson Yacht

Leasing Company, 416 U.S. 663, 94 S.Ct 2080, 40 L.Ed.2d 452 (1974) upheld a warrantless seizure only under limited circumstances. In Minnesota v. Dickerson, 124 L.Ed.2d 334, 343 (1993), the Court reiterated that "Time and again" it has been held "that searches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions.'"

Although 21 U.S.C. 881(b)(4) authorizes the Attorney General to seize property without a warrant, there must be probable cause to believe the property is subject to forfeiture. Petitioner urges review under Rule 10.1(c), Rules of the Supreme Court. This Court has held firm on the requirement that probable cause must exist for the search of an

automobile for evidence of crime. Almeida-Sanchez v. United States, 413 U.S. 266, (1973).

Every seizure is unreasonable unless it is supported by probable cause. Michigan v. Summers, 452 U.S. 692, 700 (1081). Probable cause must also be "particularized with respect to that person." Ybarra v. Illinois, 444 U.S. 85,91 (1979).

It is also been held " a warrant application based upon stale information of previous misconduct is insufficient, because it fails to create probable cause that similar or other improper conduct is continuing to occur." United States v. Bascaro, 742 Fd.2d., 1335,1345 (11th Cir. 1984).

In the instance case the law enforcement agents did not have probable cause to seize the vehicle in question. The officers stated that they based their probable cause on the

fact that they had information several months prior that Mr. Bradford had purchased a "Blazer" with drug proceeds. They also said they saw an envelope on the seat of the vehicle with Bradford's name and address on it, that the vehicle contained a dealer tag registered to Sporty Motor Company (they said information several months prior was that it was a drug front operation), and that the VIN listed the vehicle as titled in the name of Frank Brown, a police officer. The information they based probable cause on was stale information. The officers were in the area that day executing search warrants and indictments and if their information was sufficient to meet the probable cause standard they would have received a warrant for the vehicle in question or for Petitioner. The agents admitted they did not have probable cause to arrest Petitioner. The vehicle was

locked and immovable.

ISSUE II

WHETHER THE CONDUCT OF THE GOVERNMENT REQUIRES ACQUITTAL OR NEW TRIAL WHEN (A) THE GOVERNMENT, AFTER DEFENDANT WAS ARRESTED AND CONTRARY TO SPECIFIC INSTRUCTIONS FROM DEFENDANT'S ATTORNEY, SECRETLY MET WITH DEFENDANT FOR SEVERAL MONTHS PRIOR TO TRIAL WITHOUT DEFENDANT'S ATTORNEY'S KNOWLEDGE OR PERSMISSION AND/OR (B) WHETHER DOUBLE JEOPARDY OCCURRED WHEN THE GOVERNMENT OBTAINED A SUPERCEDING INDICTMENT AFTER A JURY HAD BEEN SELECTED (BUT NOT SWORN FOR TRIAL) WITH A TRIAL SET TO OCCUR WITHIN DAYS AND THE GOVERNMENT REQUESTED AND RECEIVED A CONTINUANCE OF THE TRIAL AND THE JURY WAS DISCHARGED BASED ON THE SUPERCEDING INDICTMENT?

Counsel is mindful that the case of Crist v. Brentz, 437 U.S. 28, 35 (1978), states that a jury must have been both impaneled and sworn before jeopardy attaches. But Petitioner contends that he has a right to have his trial completed by the jury selected to serve in that trial. See United States v. Jorn, 400 U.S. 470,484 (1971); Schulhofer, Jeopardy and Mistrials, 125 U PA L REV at 412-414.

It was fundamentally unfair for the

Government to come in and seek a superseding indictment from a Grand Jury the very next day after jury selection. The facts in evidence clearly show the Government was aware of the "additional facts" it had weeks prior to the selection of the July 13 jury.

Compounding this issue is the revelation that the Government met with Petitioner without his counsel's permission or knowledge for a period of about three and one half months prior to trial. Petitioner was effectively denied his Sixth Amendment right to counsel. The Government admitted it did gain incriminating information but states it was not used against Petitioner in his trial. It is impossible to determine if this incriminating information was used for the superseding indictment.

The court has authority to exercise its supervisory powers to assure fairness in a

judicial process, even though there may be no constitutional violation.

United States v. Hastings, 461 U.S. 499, 505 (1983). This is such a case where a superseding indictment was sought and there was Government intent to seek the superseding indictment even while the July 13, 1992, jury was being selected. This case also has far-reaching implications for the future of the attorney-client relationship regarding secret meetings between the government and a represented defendant, especially so in light of the fact that the "Thornburg Rule" allowing federal prosecutors to ignore state ethics rules in contacting represented defendants will officially take effect soon. See: 28 C.F.R. Part 77, (August 4 Federal Register), effective September 6, 1994.

Dated August 31, 1994

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APPENDIX A

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 16 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, *

Plaintiff, *

vs. * CASE NO. 92-155-N

DARRICK BRADFORD, *

Defendant. *

ORDER

In accordance with the attached memorandum opinion, it is the ORDER of this Court that defendant's motion for judgment of acquittal or alternatively, a new trial is DENIED.

DONE, this 8th day of October, 1992.

Truman Hobbs
United States District Judge

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 16 1994
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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, *

Plaintiff, *

vs. * CASE NO. 92-155-N

DARRICK BRADFORD, *

Defendant. *

MEMORANDUM OPINION

On September 17, 1992, defendant Darrick Bradford, was convicted in this Court of conspiring to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. §841 (a)(1). On September 24, 1992, the defendant filed a motion for a judgment of acquittal, or alternatively a new trial. As a basis for his motion the defendant alleged, among other defects, a violation of his Fifth Amendment right against being placed twice in

jeopardy. The parties filed briefs in support of, and in opposition to, said motion. The Court held an evidentiary hearing on the double jeopardy issue on October 1 and concluded the hearing on October 5, 1992. For the reasons hereinafter stated, defendant's motion is due to be denied.

FACTS

On May 14, 1992, the grand jury returned a one-count indictment charging Darrick Bradford with possession with the intent to distribute cocaine. The criminal trial term at which this case was scheduled for trial began on July 13, 1992, and on July 13, Judge Harold Albritton presided at the selection of a jury to try the single count indictment. Assistant United States Attorney Lewis Franklin represented the United States at the jury selection. A jury was empaneled, but not sworn. The jury consisted of nine black and

four white persons. One of the white jurors was an alternate. After being empaneled, the jury was sent home and told to return for the start of the trial on July 16, 1992, before Judge Ira DeMent.

On July 14, 1992, the United States, through Assistant United States Attorney Charysee Alexander, obtained a superseding indictment against Mr. Bradford. The new indictment contained two counts in addition to the original possession with the intent to distribute cocaine. The original count became Count III in the superseding indictment. Count I of the superseding indictment charged Bradford with conspiring to distribute and to possess with the intent to distribute cocaine. Count II charged Bradford with distributing cocaine on a different occasion than that set out in the original indictment.

Based upon the superseding indictment the

United States filed a motion to continue on July 15, 1992. A hearing on this motion was held the same day before Judge DeMent. At the hearing, defense counsel declined to join in the Government's motion to continue. Defense counsel did not, however, offer any objection to the continuance and defense counsel acknowledges that he was not prepared to go to trial on the superseding indictment, which greatly expanded the issues and evidence over the original indictment. Judge DeMent granted the continuance, stating that he was doing so because of the superseding indictment and also because he needed to hear evidence on defendant's motion to suppress certain evidence. Upon Judge DeMent's granting the continuance, the Clerk's Office dismissed the jury which had been selected to try the original indictment. Neither the defendant nor the United States requested that the jury

be held over for a new trial date. The case was subsequently rescheduled for trial at the next term of criminal trials which was in August before Judge Robert Varner.

On August 3, defendant moved for a continuance on the ground that the superseding indictment changed the issues so completely that he was not prepared to try the superseding indictment in August. Judge Varner granted defendant's continuance motion. The case was then set for trial on September 14, 1992, before Judge Truman Hobbs. This jury consisted of two black and eleven white persons. One of the white persons was an alternate.

When the Government rested after two days of trial, defendant objected to the trial on the basis that a jury had been previously selected and that the first jury consisted of nine black and three white persons. This

objection was the first time that the fact that a previous jury had been chosen to try the defendant was brought to Judge Hobbs' attention by party. In making his objection, defense counsel did not specifically raise the double jeopardy issue, rather he argued that the United States had sought the continuance because of the racial composition of the first jury. Judge Hobbs delayed ruling on the defendant's objection until after the completion of the trial.

After deliberations, the jury found the defendant guilty on Counts I and III, and not guilty on Count II. Count III was the count contained in the original indictment and it was the charge the first jury had been selected to try.

DISCUSSION

I. The Fifth Amendment

The Fifth Amendment to the United States

Constitution states, in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." The Supreme Court has ruled that under the United States Constitution jeopardy attaches in a jury trial when the jury is empaneled and sworn. See Crist v. Bretz, 437 U.S. 28(1978).

Although Bradford's first jury had been empaneled, the jurors had not been sworn. Trials do not commence when a jury is selected, but when the jury has been selected and sworn. See United States v. Del Vecchio, 707 F.2d 1214, 1216 (11th Cir.1983). Because the jury was not sworn, jeopardy did not attach. Therefore, there was no violation of the defendant's constitutional right against double jeopardy.

II. The Court's Supervisory Power

Even where there is no constitutional violation, federal courts should exercise

their supervisory powers to assure fairness in the judicial process even through a procedure may not violate the Constitution. United States v. Hasting, 461 U.S. 499, 505 (1983). The Supreme Court has recognized three purposes underlying the use of supervisory powers: "to implement a remedy for a violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly put before a jury, and finally, as a remedy to deter illegal conduct." Id. (citations omitted).

In this case, defendant has alleged that the United States sought a superseding indictment and a continuance because of the racial composition of the jury. If this allegation were true, the exercise of this Court's supervisory powers would be both proper and required. This Court, however,

finds that defendant's allegation is without merit.

The defendant asserts that the Government's knowledge that it would be seeking a superseding indictment and a continuance while participating in the selection of the first jury indicates an improper motive. Thus, the defendant argues, the reason for participating in the first jury selection was to give the United States the option of going forward on the first indictment if it liked the jury, or seeking a superseding indictment and continuance if the Government did not like the make-up of the jury. When nine black jurors were selected, the defendant contends that the Government decided to get this jury dismissed by filing a superseding indictment and requesting a continuance. The Court finds that the make-up of the first jury was not a consideration in

the Government seeking a superseding indictment or in the selection of a second jury.

The defendant contends that the United States should have sought the superseding indictment prior to the selection of the first jury, and that the Government's failure to do so is evidence of its improper purpose. However, the decision to seek a superseding indictment was based on new information the Government learned after Thomas and Michael Grove reached an agreement to cooperate with the Government and entered pleas of guilty on July 6, 1992. July 14, 1992, was the first time the grand jury met after the Government received the information from the Groves. Thus, the Government could not have presented new charges to the grand prior to jury selection on July 13, 1992.

Both Ms. Alexander and Mr. Franklin

testified that the racial composition of the jury was not a factor in seeking either the new indictment or the continuance. Ms. Alexander, who prepared the superseding indictment over the weekend prior to July 13, was not even aware of the composition of the first jury at the time the superseding indictment was obtained.

The Court having heard the evidence in this case is aware that Count I of the superseding indictment was supported by overwhelming evidence, and it seems apparent that the Government had a clear duty to seek a superseding indictment.

Defendant argues that he should have been tried on the original indictment, and a second trial could have gone forward on the new counts contained in the superseding indictment. Such a procedure was never suggested by defendant to Judge DeMent or to

any other judge until after his trial and conviction by a jury.

Defendant never requested that the first jury be retained, nor did he inform Judge Hobbs until after a second jury had been selected and after two days of trial that he had had any desire to have the first jury hear the case.

Ms. Alexander testified that the Government went forward with the selection of a jury on July 13 because she could not be certain that the grand jury would return a superseding indictment, nor could she be certain that Judge DeMent would grant the continuance on the basis of the superseding indictment. The dismissal of the first jury was not on any motion of the Government. The dismissal was done by the Clerk's Office when Judge DeMent issued an order continuing the case.

III. Government Contact With Defendant

Finally, defendant insisted at the hearing that the contact between the United States Attorney's office and Mr. Bradford without the knowledge of defense counsel constituted Government wrongdoing. Although the Court recognizes the potential for abuse on the part of the Government in any case where the Government talks to a defendant without his attorney being present, in this case the Court finds that the United States did not act improperly.

Mr. Bradford contacted the United States and offered to talk with the Government about a possible deal. He informed the United States that he did not want his attorney present because his attorney was an acquaintance or a friend of one who might be implicated by defendant if he cooperated with the Government. Defendant expressed concern

that the party so implicated might learn of defendant's cooperation. The United States refused to reach an agreement with defendant until defendant was represented by counsel at any meetings with the United States, and informed defendant that if he did not feel comfortable with his current counsel he should hire a new attorney. There was no evidence that the United States sought to undermine Mr. Bradford's confidence in his attorney. In fact, defendant ultimately stayed with his original counsel, Mr. Massey.

There is no evidence that the United States initiated any contact with Mr. Bradford. In fact, in late May or early June, the United States put an end to its relationship with Mr. Bradford by informing him that he was not to contact the Government until he was willing to be represented by counsel in his dealings with the United

States. The Government expressed its view that defendant was manipulating the Government by stating that he was going to get an attorney and cooperate in order to remain out on bond. At one point the Government spoke with an attorney who defendant stated he was seeking to employ. The Government did not seek to introduce any evidence from its meetings with the defendant. The defendant can point to no injury to him from the effort initiated by him to get the Government to believe that he was securing another attorney in order to cooperate with the Government.

CONCLUSION

Jeopardy did not attach upon the empaneling of the previous jury in this case and there was no violation of the defendant's Fifth Amendment rights. Moreover, the exercise of this Court's supervisory power is unnecessary because the actions of the United

States Attorney's office regarding the first jury and the office's contact with Mr. Bradford were not improper. This Court also finds the other contentions raised by the defendant in his motion for acquittal to be without merit.

A separate order will enter in conformity with this memorandum opinion.

DONE this 8th day of October, 1992.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX B

DO NOT
PUBLISH
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 16 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-7058

D.C. Docket No. CR-92-00155-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DARRICK BRADFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(March 16, 1994)

Before ANDERSON and BIRCH, Circuit Judges, and CONWAY*, District Judge.

PER CURIAM:

AFFIRMED. See 11th Circuit Rule 36-1.

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* Honorable Anne Callaghan Conway, U. S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN - 2 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-7058

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINA CHAMBERS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON and BIRCH, Circuit Judges, and CONWAY* District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED an the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en bank, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

* Honorable Anne Callaghan Conway, U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX D

FOURTH AMENDMENT, U.S. CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

FIFTH AMENDMENT, U.S. CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX F

SIXTH AMENDMENT, UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX G

21 U.S.C. 881

Seizure Pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when--

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a

search warrant under the Federal Rules of Criminal Procedure.